80-1294

No. .....

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ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

October Term, 1980

HONEYWELL, INC.,
Petitioner,

vs.

TENNESSEE VALLEY AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Are Federal bidders *per se* precluded from challenging unlawful bid procedures of Government Agencies?

2. Whether the award of a procurement contract by a Governmental Agency (Tennessee Valley Authority) is reviewable upon complaint by an unsuccessful bidder?

PARTIES

Cardio-Data Corp.
Minneapolis-Honeywell Regulator Company Inc.
Skinner International, Inc.
Skinner Electric Valve Co.
Spectronics Inc.
    Spectronics de Mexico S.A. de C.V.
Synertek Inc.
    Synertek Systems Corporation
Honeywell Building Management Services Inc.
    Honeywell Building Management Services of Colorado Inc.
    Honeywell Building Management Services of Georgia Inc.
Honeywell Communications Company
Honeywell Disc Inc.
Honeywell Europe Inc.
Honeywell Finance Inc.
Honeywell Overseas Finance Company
Honeywell Real Estate Management Services Inc.
Honeywell Realty, Inc.
    Etkin Towers, Inc.
Honeywell Electronics Corporation
    Coeur d'Alene Development Inc.
    Honeywell Limited

Honeywell Finance Limited
Honeywell Control Systems Limited
Graphco Industrial Charts Limited
Honeywell Charts Limited
New Electronic Products Limited
Three C Limited
Honeywell Information Systems Limited
Honeywell Leasing Limited
Incoterm Limited
Honeywell I.S. Limited
Systems Finance Limited
Honeywell Electronic Products Limited
Honeywell Information Systems (South Africa) Limited
Honeywell S.A.I.C.
Controles Honeywell S.A.C.I.
Honeywell Pty. Limited
Blendair Pty. Limited
Honeywell Finance Limited
Honeywell Austria Ges.m.b.H.
Honeywell Europe S.A.
Honeywell Europe S.A. Holding K.G.
Honeywell S.A.
Honeywell Assurance Limited
Honeywell Controles Limitada
Honeywell-Transcontrol Automacao Ltda
Honeywell Limited/Honeywell Limitee
Amplitrol Electronics Limited
Honeywell Holdings Limited
Toronto Cable & Tower Rentals Limited
Honeywell Information Systems (Caribbean) Ltd.
Electronics for Medicine Canada Ltd.
MQS Liquidating Ltd.
Honeywell A/S
Honeywell Dominicana C. por A.
OY Honeywell AB
OY Control AB

Honeywell S.A.
Honeywe'l G.m.b.H.
    Dienes-Honeywell G.m.b.H.
    Grs Gesellschaft Fur Raketensysteme G.m.b.H.
Honeywell-Elac-Nautik G.m.b.H.
Honeywell Limited
Honeywell India Limited
Honeywell S.p.A.
NEC Honeywell Space Systems Ltd.
Yamatake-Honeywell Co., Ltd.
    Yamatake & Co., Ltd.
    Taishin Co., Ltd.
    Yamatake Components Co., Ltd.
    Yamatake Keiso Co., Ltd.
    Yamatake Engineering Service Co., Ltd.
    Yamatake Precision Co., Ltd.
    Yamatake-Honeywell Co., Ltd., Taiwan
Honeywell International Finance CYS.A.
    Heinrich Braukmann Armaturen G.m.b.H.
        Braukmann S.a.R.L.
        Braukmann Ltd.
    Honeywell Financiering B.V.
Honeywell S.A. de C.V.
Honeywell Capital N.V.
Honeywell Internationaal B.V.
    Honeywell Middle East B.V.
        Honeywell Kuwait K.S.C.
    Honeywell Development N.V.
Honeywell European Distribution Center B.V.
Honeywell B.V.
Electronics for Medicine Europe B.V.
Honeywell (N.Z.) Limited
    MSI-Honeywell Limited
    Honeywell (Wholesale) Limited
Honeywell A/S
Honeywell Turki-Arabia Ltd.
Honeywell Controls Pte. Ltd.

Honeywell-Synertek Pte. Ltd.
Honeywell-Sime Darby Private Limited
Honeywell Automation (Proprietary) Limited
Honeywell S.A.
Honeywell AB
Honeywell AG
Honeywell-Synertek (Thai) Limited
Honeywell C.A.
    Servicios Honeywell C.A.
Honeywell Information Systems Inc.
    Honeywell Information Systems (Pacific) Inc.
    Honeywell Information Systems (South Africa) Inc.
    Incoterm de Puerto Rico, Corp.
    Magnetic Peripherals Inc.
        Magnetic Peripherals Incorporated-Germany
        Magnetic Peripherals Incorporated-Portugal
        United Peripherals Ltd.
    Honeywell Sistemas de Informacion Costa Rica S.A.
    Societe de Promotion Commerciale Bull S.A.R.L.
    Honeywell Information Systems Italia S.p.A.
    Nee-Honeywell Information Systems Limited
    Honeywell Information Systems Japan Inc.
    Honeywell Sistemas de Informacion, S.A. de C.V.
    Mexicana Industrial Honeywell, S.A. de C.V.
    Sociedade Portuguesa de Computadores em Tempo Dividido (Time Sharing) SARL
    Compagnie Internationale Pour L'Informatique - CII Honeywell Bull S.A.
        OY Honeywell Bull AB
        Cii Honeywell Bull Afrique, S.A.
            Cii Honeywell Bull Cameroun
            Cii Honeywell Bull Gabon
            Cii Honeywell Bull Cote D'Ivoire
            Cii Honeywell Bull Senegal
        Realisations Etudes Electroniques
            R2E of America

Compagnie Francaise D'Investissements Prives (COFIP)
Cii Honeywell Bull Systems
Bull Corporation of Japan
Honyewell Bull S.A.I.
Honeywell Bull Madagascar
Honeywell Bull Maroc S.A.
Bull Holding S.A.
Cii Honeywell Bull Finance B.V.
Bull Corporation of America
Compagnie CII-HB Internationale N.V.
Bull Argentina S.A.C.I. de Equipos Para El Trataminento de la Informacion
Honeywell Bull AG
Honeywell Bull, S.A.
Honeywell Bull Do Brasil S/A Sistemas de Informacao
Honeywell Bull A/S
Honeywell Bull AG
DVM - Datenverarbeitungsmaschinen und time-sharing G.m.b.H.
Anonimos Emboriki ke Viomichaniki Eteria Honeywell Bull A.E.
Honeywell Bull (Nederland) N.V.
N.V. Kamatec
N.V. Kamadex
Cii Honeywell Bull Finance Overseas N.V.
Cii Honeywell Bull Systems N.V.
Honeywell Bull A/S
Sociedade Portuguesa Honeywell Bull, Lda.
Honeywell Bull, S.A.
Datasystem, S.A.
Honeywell Bull AB
Honeywell Bull (Schweiz) AG
Bull del Uruguay S.A.

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No. .....

In the Supreme Court of the United States

October Term, 1980

HONEYWELL, INC.,
Petitioner,

vs.

TENNESSEE VALLEY AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Honeywell, Inc. petitions for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (*infra*, pp. A1-A4 is not officially reported). The opinion of the Court of Appeals (Appendix B, *infra*, pp. A5-A6) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on the 3rd day of November, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

United States Constitution, Article III, Section 2, Appendix C, p. A7.

16 U.S.C. §831h(b) Appendix C, pp. A7-A8.

STATEMENT OF THE CASE

This is an action by Honeywell, Inc. (hereinafter referred to as Honeywell) for the recovery of loss of profits and cost of bid preparation in connection with their bid on Tennessee Valley Authority (hereinafter TVA) invitation for bid #8-823481, which Honeywell maintains was unlawfully awarded to another bidder

On the 17th day of January, 1979, at 10:14 p.m., Honeywell requested and obtained *ex parte,* a temporary restraining order signed by the Honorable Thomas A. Wiseman, Jr., Judge in the United States District Court for the Middle District of Tennessee, at Nashville. The temporary restraining order was addressed to the TVA and its agents, directing that TVA not award a contract to another bidder as it had announced it intended to do on the next day. The temporary restraining order was issued upon the sworn allegations in the Complaint that TVA had violated the bid provisions of 16 U.S.C. §831h(b) and was attempting to eliminate competition.

Honeywell, in response to the TVA's invitation to bid submitted a bid that took no exceptions to the specifica-

tions and in an amount of Nine Hundred Seven Thousand Six Hundred Ten and 59/100 ($907,610.59) Dollars. Pyrotronics, Inc. (hereinafter referred to as Pyrotronics) submitted a bid of One Million One Hundred Seventy One Thousand Seven Hundred Sixty Four and 23/100 ($1,171,764.23) Dollars. There were no other bidders. TVA advised Honeywell that it was the successful low bidder but never gave Honeywell a contract. Honeywell alleged that by the unlawful award of the contract to the competitor, it would suffer immediate and irreparable injury, economic loss and monetary damage.

Prior to the hearing on Honeywell's Motion for a Preliminary Injunction, Honeywell filed an amended complaint and TVA filed a motion to dismiss. At the hearing held on January 22, 1979, Judge Wiseman dissolved the temporary restraining order and on January 26, 1979, entered a Memorandum Decision granting TVA's motion to dismiss the Honeywell complaint (Appendix A, pp. A1-A4). On January 31, 1979, the Plaintiff filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit from the District Court's decision.

The record in this case was transmitted to the United States Court of Appeals for the Sixth Circuit by the Clerk of the United States District Court for the Middle District of Tennessee on March 7, 1979. All pleadings and briefs were timely filed with the Court of Appeals and the case was argued before that Court on October 17, 1980.

On the 3rd day of November, 1980, the Court of Appeals of the Sixth Circuit issued its decision holding that the District Court was bound by the prior decisions of the Sixth Circuit, which hold that an unsuccessful bidder on a Government contract does not have standing in a Federal Court to obtain relief when the contract is awarded to a competitor and therefore the District Court judgment should be affirmed.

REASONS FOR GRANTING THE WRIT

This Writ of Certiorari should be granted so that the trend of recent holdings in the Sixth Circuit Court of Appeals denying standing to unsuccessful low bidders of government procurement contracts will end.

I. The Problem

In this case, the Sixth Circuit, in its *per curiam* opinion noted that the District Judge:

> ". . . concluded that he was bound by the prior decisions of this Circuit which, primarily on the authority of *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), held that an unsuccessful bidder on a government contract does not have standing in a federal court to obtain relief when the contract is awarded to a competitor." Appendix A, p. A6.

The Sixth Circuit Court of Appeals then stated that:

> ". . . the Court has not been persuaded that it should depart from its former and well established rule. . ." Appendix B, p. A6.

The Sixth Circuit's reliance upon the "rule" of *Perkins v. Lukens*, to deny standing to unsuccessful bidders ignores:

(a) *Perkins* was not an "unsuccessful bidder" case. The "rule" of *Perkins* is merely dictum and has never been followed by the United States Supreme Court.

(b) Many significant Congressional enactments, including notably the *Administrative Procedure Act*, 5 U.S.C. §702 (1946) have become law in the forty (40) years

since this court rendered the decision of *Perkins v. Lukens, supra.*[1]

(c) The Supreme Court has never cited *Perkins* as authority in dealing with the issue of standing. This is a particularly salient point when viewed in light of the fact that from 1970 to 1979, Professor Davis stated that the Court has decided twenty-seven (27) major standing cases.[2]

II. The Rebirth of Perkins

In what was apparently the Sixth Circuit Court of Appeals' first bidder case since *Perkins, Cincinnati v. Kleppe,* 509 F.2d 1080 (6th Cir. 1975), the Court found that the plaintiff was a "small business concern" and that the *Armed Service Procurement Act,* 10 U.S.C. §2301, contained a policy statement that a ". . . fair portion of purchases and contracts made under this Chapter be placed with small business concerns . . .". On this basis the unsuccessful bidder was given standing. But the Court went on to hold that:

> ". . . absent such a Congressionally created exception, the general rule of *Perkins v. Lukens Steel, supra,* that a disappointed bidder has no legally enforceable right against the government's award of a procurement contract retains its validity." p. 1086.

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1. *Cincinnati Electronics v. Kleppe,* 509 F.2d 1080 (6th Cir. 1975). The Court of Appeals in discussing *Perkins v. Lukens Steel Co., supra,* stated "the court of appeals discounted the continuing authority of *Perkins v. Lukens Steel Co., supra,* on the ground that it was decided before the passage of *APA* and before amendment of the *Public Contracts Act.* The legislative history of the relevant amendment to the *Public Contracts Act* was set forth in the opinion, in particular the statements of Senator Fulbright that the purpose of the amendment was to overturn the decision in *Lukens Steel.*

2. *Kenneth Culp Davis; Administrative Law Treatise;* 1980 Supp., K.C. Davis Pub. Co.; San Diego, CA. p. 160.

The Sixth Circuit stated that the Supreme Court has never alluded to the *Perkins* case but nevertheless adopted the above stated rule. *Kleppe, supra,* p. 1083.

Since *Kleppe, supra,* the Court of Appeals for the Sixth Circuit has turned back the challenge of unsuccessful bidders alleging unlawful bid practices by TVA with *per curiam* opinions in *G.F. Business Equipment v. TVA,* 430 F. Supp. 699 (E.D. Tenn. 1975), *aff'd,* 556 F.2d 581 (6th Cir. 1977) and in the case at bar. Since 1977, the District Courts of the Sixth Circuit, following the Circuit's mandate, have denied bidders' challenges of alleged unlawful TVA bid procedures in at least four instances including the case at bar.[3]

III. Perkins Was Not an Unsuccessful-Bidder Case

In *Perkins v. Lukens Steel Company,* 310 U.S. 113 (1940) a group of individual iron and steel manufacturers sued for themselves and all others in the industry to enjoin the Secretary of Labor's enforcement of the "localities" for determining the "prevailing minimum wage" which bidders under the *Public Contracts Act,* 41 U.S.C. §§35, *et seq.* were required to pay before their bid could be considered. The Plaintiffs claimed no present injury and the Court noted that since the Secretary had not even formally designated the "locality" and had not sought to enforce a "prevailing wage" the Plaintiffs had not yet been denied a contract or suffered any harm by virtue of the proposed determination of the Secretary. In denying standing to the Plaintiffs the Court stated:

> "Our decision that the company's lack of standing to sue does not rest upon a mere formality. We rest it

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3. *G.F. Business Equipment v. TVA, supra; Inryco, Inc. v. TVA,* 471 F. Supp. 59 (E.D. Tenn. 1978); *Honeywell, Inc. v. TVA,* No. 79-1156 (M.D. Tenn. 1979).

upon reasons deeply rooted in the Constitutional decisions of authority in our system of government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public." p. 132.

The *Perkins* decision contains *dicta* to the effect that the government may buy from whom it wishes and in any manner which it wishes and it is this *dicta* which has been seized upon by the Sixth Circuit to deny standing to Honeywell and others. However, clearly the holding in *Perkins* is that Plaintiffs who never submitted a bid under the proposed ruling of the Secretary of Labor lacked the requisite "case and controversy" requirements under Article III of the Constitution.

IV. The Current Law of Standing

During this last decade, the Supreme Court has directly faced the issue of plaintiff standing in at least thirty major decisions. Though none of these decisions discuss the standing of an unsuccessful bidder, the diversity of plaintiffs and the breadth of the subject matters is clearly indicative of this Court's intentional abandonment of any static rule which might relate to a particular class of plaintiffs such as the unsuccessful bidders for Government procurement contracts. Indeed, it appears that the Sixth Circuit stands alone in its position.[4]

Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) involves a challenge by citizens living near the site of proposed nuclear plants of the

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4. *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183 (D.C. Cir. 1972); *Rental Housing Association of Greater Lynn, Inc. v. Hills*, 548 F.2d 388 (1st Cir. 1977); *William F. Wilke, Inc. v. Department of Army of U.S.*, 485 F.2d 180 (4th Cir. 1973); *Merriam v. Kunzig*, 476 F.2d 1233 (3rd Cir. 1973); *Hayes International Corporation v. McLucas*, 509 F.2d 247 (5th Cir. 1975).

Price-Anderson Act, 42 U.S.C. §2210, which imposed a limitation on liability for nuclear accidents resulting from the operation of Federally licensed private nuclear power plants. The Plaintiffs alleged various environmental and health hazards associated with the construction and operation of nuclear plants and alleged that the statutory limit on liability would serve to encourage private industry to construct such plants. Thus, the Plaintiffs asserted that they would be injured by the existence of the Act and alleged that the Act was unconstitutional. The Supreme Court held that the Plaintiffs had standing to challenge the Act's legality. The Court said:

> "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' . . . As refined by subsequent reformulation, this requirement of a 'personal stake' has come to be understood to require not only a 'distinct and palpable injury,' to the plaintiff, *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed. 2d 343, but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977)." p. 72.

The Court further stated:

> "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basis practical and prudential concerns

underlying the standing doctrine are generally satisfied when the Constitutional requisites are met." pp. 80, 81.

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (April 1979), is a suit seeking to enforce certain provisions of the *Fair Housing Act of 1968,* 42 U.S.C. §§3601, *et seq.* against two real estate brokerage firms and several of their employees. The Plaintiffs conceded that they were not in fact seeking to purchase homes but rather were "testors" engaged in an investigation to determine whether or not the petitioners were practicing racial steering. This case is particularly helpful with regard to the Court's determination of the "Constitutional requisites" relative to the standing issue.

In *Gladstone* the Court found that the plaintiff, "testors" had standing to challenge the practices of the defendant realtors under the *Fair Housing Act of 1968.* The Court said that Constitutional requisites were satisfied in the following manner:

> "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of punitively illegal conduct of the defendant." *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59 (1978). *Gladstone ,supra,* p. 99.

The Court said in determining whether or not a plaintiff has standing that it would:

> ". . . accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party . . ." *Gladstone, supra,* p. 109.

The Court then determined that even the testors under the *Fair Housing Act* had a "distant and palpable injury which was likely to be redressed if the requested relief

was granted" and determined that the plaintiffs had standing.

Finally, the most recent case of *U. S. Parole Comm. v. Geraghty,* 445 U.S. 388 (March 1980), is further illustrative of the Court's determination not to preclude plaintiffs from the right to challenge unlawful government actions predicated solely upon inflexible characterizations. In this rather unusual case the plaintiff, Geraghty, had brought suit against the U. S. Parole Commission in his own behalf and as representative of a class of prisoners who were aggrieved by the Commission's parole release guidelines which the plaintiff said were violative of both the *Parole Commission and Reorganization Act,* 18 U.S.C. §§4201-4218, creating the Commission and the U. S. Constitution. The Supreme Court held that the plaintiff's individual claim was moot because by the time the Court considered his case he had been released and thus the individual plaintiff did not have standing to pursue his claim. However, the Court found that the plaintiff in his capacity as class representative could proceed and did, in behalf of the class, and did have standing. The Court said:

> "We concede that the prior cases may be said to be somewhat confusing, and that some, perhaps are irreconcilable with others. Our point is that the strict formalistic view of Article III Jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And in creating each exception the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized aptly as 'flexible' . . ." p. 406, Footnote 11.

The holding in *Geraghty, supra,* was announced by a majority opinion of a closely divided (5-4) Court. However, though the Court divided on various issues, there was unanimity by both the majority and the dissent on the

application of inflexible rules of standing which precluded plaintiffs from challenging unlawful Government action. The dissent differed with the majority on the issue of whether the individual plaintiff in *Geraghty* could represent a class when he himself had no "personal stake" in the outcome of the litigation. However, the dissenters of the Court, after observing that in their view the Article III requirement of a "personal stake" rendered the majority incorrect noted:

> "The prudential aspect of standing aptly is described as a doctrine of uncertain contours." *Geraghty, supra,* p. 410.

Thus, in *Geraghty, supra,* the entire Court agreed that assuming the presence of the Constitutional requisites of "case and controversy" under Article III, any further restrictions upon the standing of a plaintiff must, of necessity, be flexible and dependent upon the circumstances of each case. This view is opposed to the rigid preclusion by the Sixth Circuit of all unsuccessful bidders.

CONCLUSION

Honeywell clearly meets the Article III Constitutional requisites. There is a legitimate case and controversy. Also, Honeywell has been directly harmed by the unlawful action of a government agency. The remedial power of the federal courts can adequately remedy the loss occasioned to Honeywell. In spite of all these facts the courthouse doors in the Sixth Circuit remain closed.

United States District Judge Thomas Wiseman reluctantly followed the precedent of the Sixth Circuit in dismissing Honeywell's suit. But in doing so he expressed his frustration with the patently illogical rule when he asked:

"If there is an arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract . . ." Appendix p. A3.

Judge Wiseman's question begs the answer: "No one". The taproot of abuse grows longer.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed January 23, 1979)

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 79-3024-NA-CV

HONEYWELL, INC.

vs.

TENNESSEE VALLEY AUTHORITY

MEMORANDUM

This Memorandum represents a transcript of the oral opinion delivered by the court from the bench at the conclusion of the trial of this action. As such it constitutes the court's findings of fact and conclusions of law.

This is a case in which the Court disagrees with what it considers to be controlling precedent. In the Cincinnati versus Kleppe case the Sixth Circuit rejected a broad application of Section 10 (a) of the Administrative Procedures Act, 5 United States Code 704.

There the court held that standing is conferred by Section 10 only when a relevant statute indicates congressional intent, that the person or firm seeking review comes within the zone of interest sought to be regulated or protected.

Absent such a congressionally created exception the general rule of Perkins versus Lukens Steel that a disappointed bidder has no legally enforceable right against the government's award of procurement contracts retains its validity.

My brother, Judge Wilson of the Eastern District of Tennessee, applied the Kleppe holding to a situation almost on all fours with the case at bar, in the case of GF Business Equipment versus TVA, 430 Fed. Supp. 699 in 1975 holding that the TVA Act did not specifically authorize judicial review of administrative decision making.

The court there held that the issue of standing depends on two questions; one is the complainant aggrieved in fact and, two, is the interest sought to be protected by the plaintiff arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.

Finding the first criteria to be met, Judge Wilson went on to hold that the second was not.

When he said; ". . . in the instant case the court is unable to find an expression of congressional policy which supports the contention that an unsuccessful bidder for a TVA contract is arguably within the zone of interest to be protected by 16 USC 831h. Therefore, in accordance with the Kleppe decision the court concludes that the plaintiff has no standing to maintain its action against TVA for possible violation of the TVA's procurement statute."

The opinion of Judge Wilson was affirmed by the Sixth Circuit on March 2, 1977, in which it found that the lower court had ". . . correctly applied the controlling precedent in this Circuit."

This Court finds the rationals of Scanwell Laboratories, Incorporated, 424 Federal Reporter 2nd, 859 to be

far more persuasive when the Court there said, "If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits, at least until or unless this country adopts the ombudsman system used so successfully as a watchdog of government activity elsewhere."

The criticism of Professor Davis is particularly poignant in that it runs counter to the natural instincts of this judge.

Quoting Professor Davis, the Scanwell court said, "One who is seriously harmed by reviewable administrative action which is illegal or even unconstitutional is often denied judicial review on account of lack of standing. The law of standing is fundamentally artificial to the extent that one who is in fact harmed by administrative action is held to lack standing to challenge the legality of the action. The artificiality, frequently running counter to natural instincts of judges, results in a complexity that is so great that the Supreme Court often violates the principles that the court has laid down for its own guidance."

Nevertheless, this Court feels bound by existing precedent in this Circuit rendered less than two years ago. Upon appeal of this case the Court of Appeals may reconsider its opinion in GF Business Equipment, Supra, and in light of the trend of more recent Supreme Court decisions.

In the meantime, however, this Court is bound by clearly applicable precedent which is controlling in the case at bar.

(Filed January 26, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 79-3024-NA-CV

HONEYWELL, INC.

vs.

TENNESSEE VALLEY AUTHORITY

ORDER

In accordance with the opinion delivered from the bench and for the reasons stated therein, the motion to dismiss by the defendant, Tennessee Valley Authority, is granted.

/s/ Thomas A. Wiseman, Jr.
United States District Judge

APPENDIX B

NO. 79-3024-NA-CV

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HONEYWELL, INC.,
Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Decided and Filed November 3, 1980

Before: Weick and Engel, Circuit Judges; and Cecil, Senior Circuit Judge.

Plaintiff Honeywell, Incorporated, appeals from an order of the district court dissolving a temporary restraining order and dismissing its action for loss of profits and waste of which it submitted for the furnishing to the Tennessee Valley Authority of certain fire alarm systems for the Hartsville and Phipps Bend nuclear plants.

Honeywell's original bid, although the lowest, was rejected, purportedly for non-conformity with the specifications as advertised by the TVA. TVA did not re-advertise but, exercising its authority to declare an emergency (due to time limitations) under 16 U.S.C. § 831h(b)(1), it

awarded the contract to a competitor who during negotiation had resubmitted a bid only slightly lower than Honeywell's. In dismissing the action, United States District Judge Thomas A. Wiseman concluded that he was bound by the prior decisions of this circuit which, primarily on the authority of *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), held that an unsuccessful bidder on a government contract does not have standing in a federal court to obtain relief when the contract is awarded to a competitor. *Cincinnati Electronics Corp v. Kleppe*, 509 F. 2d 1080 (6th Cir. 1975); *GF Business Equipment v. TVA*, 430 F.Supp. 699 (E.D. Tenn. 1975), *aff'd.* 556 F.2d 581 (6th Cir. 1977). *See also Inryco, Inc. v. TVA*, 471 F.Supp. 59 (E.D. Tenn. 1978). Appellant vigorously asserts that the standing requirements promulgated by the Supreme Court in *Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), particularly its reference to the "zone of interest" test has been largely abandoned by later decisions of the Supreme Court and urged instead an application of what it defines as the fairly traceable causation test enunciated in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). *Duke Power*, appellant asserts, in turn recognizes the more expanded concept of standing set forth in *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

Although it has carefully considered these arguments, the court has not been persuaded that it should depart from its former and well established rule, especially as it pertains to the unique and independent role of the TVA. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

/s/ John P. Hehman, Clerk

APPENDIX C

PERTINENT TEXTS OF THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

Constitution of the United States, Article III, Section 2.

[1] The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects.

16 U.S.C. §831h(b). All purchases and contracts for supplies or services, except for personal services, made by the Corporation, shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: Provided, That advertisement shall not be required when, (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed $500; in which cases such purchases of supplies or procurement

of services may be made in the open market in the manner common among businessmen: Provided further, That in comparing bids and in making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

No. 80-1294

MAR 25
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

HONEYWELL, INC., PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that a bidder under a procurement invitation by the Tennessee Valley Authority (TVA) lacks standing to challenge TVA's rejection of all bids for failure to meet specifications and its subsequent contracting with another party who met specifications and offered the lowest price.

2. Whether the determination of the TVA Board on the award of a TVA procurement contract is subject to judicial review.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*)[1] is not reported. The decision of the district court (Pet. App. A)[2] was delivered orally in open court.

JURISDICTION

The judgment and opinion of the court of appeals were entered on November 3, 1980. The petition for a writ of

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[1] As reprinted in petitioner's appendix (Pet. App. B), part of the first paragraph of the opinion of the court of appeals has been omitted. Thus, we have reprinted the full opinion as an appendix here.

[2] In the decision of the district court, as reprinted in petitioner's appendix (Pet. App. A), the title "Memorandum" and the first paragraph following the title have been added, apparently by petitioner. The appendix also omits the final sentence of the original transcript, which states, "The motion to dismiss is granted."

certiorari was filed on February 2, 1981.[3] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The full text[4] of Section 9(b) of the TVA Act, 16 U.S.C. 831h(b), is set forth as Appendix B, *infra*.

STATEMENT

On February 3, 1978, TVA publicly advertised for bids on fire alarm systems for two nuclear generating plants that were under construction (Amended Complaint, para. 4). Bids were received from petitioner and from Pyrotronics, Inc. (Pet. 2-3). Petitioner's bid was lower than that submitted by Pyrotronics (*id.* at 3), but TVA determined that neither bid met specifications. Thus, both of the bids were rejected (Amended Complaint, para. 6).[5]

The fire alarm systems were urgently needed to avoid delays in construction schedules, and the TVA Board therefore authorized emergency purchase of the systems through negotiation under Section 9(b) of the TVA Act, 16 U.S.C. 831h(b). See 43 Fed. Reg. 52849 (1978). TVA then entered into negotiations with both petitioner and Pyrotronics. During these negotiations, TVA made clear to each of the bidders the deficiencies in the original bids, as well as the changes that would be necessary if their offered products were to be deemed acceptable (Amended Complaint, paras. 7-10). Both of the companies submitted new offers meeting these requirements (*id.* at para. 11). Pyrotronics' offer was the lower.

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[3]The petition was served on TVA on February 3, but the Solicitor General first received a copy on February 19.

[4]Petitioner has set forth in its appendix (Pet. App. C) only one paragraph of Section 9(b).

[5]Petitioner incorrectly states (Pet. 2) that its bid "took no exceptions to the specifications" and that it was the "successful low bidder" (Pet. 3). Petitioner's offer was "low" as to what it chose to offer, not as to what TVA sought.

Before a contract could be awarded to Pyrotronics, petitioner brought this action and obtained an ex parte temporary restraining order prohibiting the TVA Board from acting on the purchase. Petitioner contended that it was "the apparent low bidder" under the original invitation, that its bid had met the specifications under the invitation (despite TVA's determination that petitioner's bid failed to do so in six material respects), and that TVA's awarding of a negotiated contract to Pyrotronics would be "unlawful" under Section 9(b) of the TVA Act (Amended Complaint, paras. 5, 16 & 17). Petitioner asked that the court direct TVA to award it the contract or, alternatively, to award it damages.

TVA moved to dismiss on the ground that petitioner lacked standing under the TVA Act to challenge the proposed contract award. The district court thereafter vacated the temporary restraining order and granted the motion. The court of appeals affirmed.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition should therefore be denied.

1. The court of appeals was correct in holding that bidders on government contracts lack standing to challenge contract awards in the absence of a statute or regulation within whose zone of protected interests they arguably fall, "especially as [this rule] pertains to the unique and independent role of the TVA" (App. A, *infra*, 2a).[6]

---

[6]The decision below is consistent with previous decisions of the Sixth Circuit in this area. See *Cincinnati Elecs. Corp.* v. *Kleppe*, 509 F. 2d 1080 (1975); *GF Business Equip., Inc.* v. *TVA*, 430 F. Supp. 699 (E.D. Tenn. 1975), aff'd, 556 F. 2d 581 (1977). Contrary to petitioner's implication (Pet. 4-5 & n.1), the Sixth Circuit's opinions have not held that bidders categorically lack standing to challenge government contract awards. In fact, *Kleppe* expressly permitted such a challenge where a

In holding that the TVA Act provides no such protection, the court of appeals was clearly correct because, whatever may be the situation with respect to other government agencies, Section 9(b) of the TVA Act expressly authorizes TVA to award contracts to parties other than a low bidder:

> *Provided further*, That in comparing bids and in making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications. * * *

The effect of this provision was considered in detail more than 40 years ago by a special joint congressional committee created by statute (52 Stat. 154) to review TVA's activities. The committee stated (S. Doc. No. 56, 76th Cong., 1st Sess. 117-118 (1939)):

> The Authority has * * * rejected low bids where superior products could be obtained at a slightly higher price * * *.
>
> * * * * *
>
> The * * * exceptions taken by the General Accounting Office to the Authority's purchases * * * on the ground that they violated the statute, are without foundation in law.

---

particular statute—in that case, the Small Business Act—arguably protected the interest asserted by the complaining small business bidder. At all events, petitioner's argument that any plaintiff who pleads injury automatically has standing simply ignores the many decisions of this Court dealing with prudential limitations on standing. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979). Finally, petitioner's argument that the Administrative Procedure Act confers standing ignores both 5 U.S.C. 701(a) and this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977).

In the face of this conclusion, Congress not only left intact the portion of Section 9(b) upon which the conclusion was based (and which is quoted above), but amended this section two years later by adding the following:

> *Provided*, That, subject only to the provisions of the Tennessee Valley Authority Act of 1933, as amended, the Corporation is authorized * * * to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary * * * and, notwithstanding the provisions of any other law governing the expenditure of public funds, the General Accounting Office * * * shall not disallow credit for, nor withhold funds because of, any expenditure which the Board shall determine to have been necessary to carry out the provisions of said Act. [7]

---

[7] 55 Stat. 775-776, 16 U.S.C. 831h(b). On a number of occasions, Congress has since recognized the need of TVA, in light of its specialized program responsibilities, for more procurement flexibility than is required by government agencies generally. TVA has thus been accorded special exemptions from the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 474(12)), the Office of Federal Procurement Policy Act (41 U.S.C. 405(c)), and the Contract Disputes Act of 1978 (41 U.S.C. (Supp. III) 602(b), 607(b)(2), (g)(2), (h), (i)). The exemptions under the Contract Disputes Act of 1978 were included in a series of amendments offered on the Senate floor by Senator Byrd, the majority leader, who stated (124 Cong. Rec. S18640-S18641 (daily ed. Oct. 12, 1978)):

> The five amendments dealing with the Tennessee Valley Authority clarify the application of S. 3178 to the operation of the TVA. The purpose of these amendments is to maintain the status quo regarding the traditional flexibility and independence of the Tennessee Valley Authority * * *. It is recognized that the Tennessee Valley Authority has highly specialized purchasing needs and that it must have the freedom to exercise its business judgment in individual instances to be able to maintain the efficiency of its operations.

Thus, Section 9(b) expressly gives notice to low bidders on TVA contracts that they enjoy no protection against awards to higher bidders.

Here, petitioner is apparently objecting to TVA's rejection of all bids under the original invitation, based on the failure of those bids to meet specifications, and TVA's subsequent award (following negotiations) to the lower offeror. Rejection of all bids for failure to meet specifications, as well as for various other reasons, is a commonplace type of procurement action by government agencies, including those agencies which act under the Federal Procurement and Armed Services Procurement Regulations, which have considerably less procurement flexibility than does TVA. See 41 C.F.R. 2.404-1; 32 C.F.R. 2-404.1 (1979). And, as this Court has pointed out, no one has a right to a government contract. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Reeves, Inc.* v. *Stake*, No. 79-677 (June 19, 1980).

Finally, it should be noted that petitioner did not even file this action until after it had participated in negotiations with TVA, submitted a new offer pursuant to the negotiations (which followed rejection of the original bids), and had learned that a better offer had been made by its competitor (Amended Complaint, paras. 11, 12 & 15).

2. Petitioner purports (Pet. I) to raise reviewability as a question presented here, but the petition does not discuss that issue. The courts below did not reach this question because of their decisions with respect to standing. At all events, we believe it is clear that the determinations of the TVA Board—that both bids failed to meet specifications, that both should be rejected, and that the contract should be awarded on the basis of negotiations with both bidders—are not judicially reviewable in light of the provisions of Section 9(b) of the TVA Act. See *Hi-Ridge Lumber Co.* v. *United States*, 443 F. 2d 452, 454-456 (9th Cir. 1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

HERBERT S. SANGER, JR.
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Tennessee Valley Authority

MARCH 1981

DOJ-1981-03

APPENDIX A

79-1156

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED

NOV 3, 1980

John P Hehman, Clerk

HONEYWELL, INC.,

Plaintiff-Appellant

V.

ORDER

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellee

Before: WEICK and ENGEL, Circuit Judges and CECIL, Senior Circuit Judge

Plaintiff Honeywell, Incorporated, appeals from an order of the district court dissolving a temporary restraining order and dismissing its action for loss of profits and waste of bid preparation in connection with a bid which it submitted for the furnishing to the Tennessee Valley Authority of certain fire alarm systems for the Hartsville and Phipps Bend nuclear plants.

Honeywell's original bid, although the lowest, was rejected, purportedly for non-conformity with the specifications as advertised by the TVA. TVA did not re-advertise but, exercising its authority to declare an emergency (due to time limitations) under 16 U.S.C. § 831h(b)(1), it awarded the contract to a competitor who during negotiation had resubmitted a bid only slightly lower than Honeywell's. In

dismissing the action, United States District Judge Thomas A. Wiseman concluded that he was bound by the prior decisions of this circuit which, primarily on the authority of *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940), held that an unsuccessful bidder on a government contract does not have standing in a federal court to obtain relief when the contract is awarded to a competitor. *Cincinnati Electronics Corp.* v. *Kleppe*, 509 F. 2d 1080 (6th Cir. 1975); *GF Business Equipment* v. *TVA*, 430 F. Supp. 699 (E.D. Tenn. 1975), aff'd, 556 F. 2d 581 (6th Cir. 1977). See also *Inryco, Inc.* v. *TVA*, 471 F. Supp. 59 (E.D. Tenn. 1978). Appellant vigorously asserts that the standing requirements promulgated by the Supreme Court in *Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), particularly its reference to the "zone of interest" test has been largely abandoned by later decisions of the Supreme Court and urged instead an application of what it defines as the fairly traceable causation test enunciated in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). *Duke Power*, appellant asserts, in turn recognizes the more expanded concept of standing set forth in *Scanwell Laboratories* v. *Shaffer*, 424 F. 2d 859 (D.C. Cir. 1970).

Although it has carefully considered these arguments, the court has not been persuaded that it should depart from its former and well established rule, especially as it pertains to the unique and independent role of the TVA. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

s/s John P. Hehman

Clerk

APPENDIX B

Section 9(b) of the TVA Act, 16 U.S.C. 831h(b)

All purchases and contracts for supplies or services, except for personal services, made by the Corporation, shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: *Provided*, That advertisement shall not be required when, (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed $10,000; in which cases such purchases of supplies or procurement of services may be made in the open market in the manner common among businessmen: *Provided further*, That in comparing bids and in making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

The Comptroller General of the United States shall audit the transactions of the Corporation at such time as he shall determine, but not less frequently than once each governmental fiscal year, with personnel of his selection. In such connection he and his representatives shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property,

and places belonging to or under the control of or used or employed by the Corporation, and shall be afforded full facilities for counting all cash and verifying transactions with and balances in depositaries. He shall make report of each such audit in quadruplicate, one copy for the President of the United States, one for the chairman of the Board, one for public inspection at the principal office of the Corporation, and the other to be retained by him for the uses of the Congress: *Provided*, That such report shall not be made until the Corporation shall have had reasonable opportunity to examine the exceptions and criticisms of the Comptroller General or the General Accounting Office, to point out errors therein, explain or answer the same, and to file a statement which shall be submitted by the Comptroller General with his report. The expenses for each such audit shall be paid from any appropriation or appropriations for the General Accounting Office, and such part of such expenses as may be allocated to the cost of generating, transmitting, and distributing electric energy shall be reimbursed promptly by the Corporation as billed by the Comptroller General. Nothing in this chapter shall be construed to relieve the Treasurer or other accountable officers or employees of the Corporation from compliance with the provisions of existing law requiring the rendition of accounts for adjustment and settlement pursuant to section 71 of title 31, and accounts for all receipts and disbursements by or for the Corporation shall be rendered accordingly: *Provided*, That, subject only to the provisions of this chapter, the Corporation is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary, including the final settlement of all claims and litigation by or against the Corporation; and, notwithstanding the provisions of any other law governing the expenditure of public funds, the General Accounting Office, in the settlement of the

accounts of the Treasurer or other accountable officer or employee of the Corporation, shall not disallow credit for, nor withhold funds because of, any expenditure which the Board shall determine to have been necessary to carry out the provisions of said chapter.

The Corporation shall determine its own system of administrative accounts and the forms and contents of its contracts and other business documents except as otherwise provided in this chapter.